

(1986) 07 CAL CK 0027

Calcutta High Court

Case No: None

Govinda Chandra Bag

APPELLANT

Vs

Radhakanta Bad and Others

RESPONDENT

Date of Decision: July 25, 1986

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 251, 256, 313
- Penal Code, 1860 (IPC) - Section 323

Citation: (1987) CriLJ 477 : 91 CWN 941

Hon'ble Judges: Monoranjan Mallick, J

Bench: Single Bench

Judgement

Monoranjan Mallick, J.

This is an appeal against the order of acquittal dt. 30-3-84 passed by Sri M. M. Ghosh, Judicial Magistrate, 2nd Court, Barrackpore, in case No. C 292 of 1981/T u/s 323, Penal Code, acquitting the accused respondents u/s 256, Cr.P.C. The facts briefly are as follows:

2. The complainant filed a petition of complaint against the accused respondents u/s 323, Penal Code. The process was issued against the accused respondents and at examination of the accused respondents u/s 251, Cr.P.C. the accused pleaded not guilty to the charge, the trial proceeded. The evidence of all the witnesses were examined and after examination of the accused respondents u/s 313, Cr.P.C., the learned Magistrate fixed 30-3-84 for hearing argument. On that date the complainant remained absent, and on repeated calls took no steps. As all the accused persons were present, the learned Magistrate found from the conduct of the complainant that he was not eager to proceed with the case. With these observations the learned Magistrate acquitted the accused respondents u/s 256, Cr.P.C, on the ground of absence of the complainant on the date fixed for hearing arguments of the parties.

3. Being aggrieved by the above order of acquittal, the present appeal has been preferred by the complainant on obtaining special leave.

4. It is submitted that the learned Magistrate erred in law in acquitting the accused respondents u/s 256, Cr.P.C, in view of the facts and circumstances of the case that the complainant remained present on all the dates of hearing and only on the date for hearing arguments the learned Magistrate due to late running of train reached the Court late by a few minutes and the learned Magistrate by the time when the complainant reached dismissed the case acquitting the accused respondents u/s 256, Cr.P.C, that he was never absent in the case throughout the proceeding and as it was the first time that the complainant could not reach the Court in time due to unavoidable circumstances the learned Magistrate should not have, in the facts and circumstances, acquitted the accused respondents u/s 256, Cr.P.C.

5. Mr. B. K. Sinha, learned Advocate for the State, has submitted that in the facts and circumstances of the case the complainant should have been given an opportunity to complete his argument and for that purpose the learned Magistrate should have exercised his discretion to adjourn the hearing when the evidence of all the witnesses was taken and the case was fixed for hearing arguments alone. It is also submitted that the learned Magistrate called for a police report on the basis of the allegation of the complainant that the accused respondents were constantly threatening him and no police report was yet submitted and in such circumstances he ought to have adjourned the hearing, both for hearing arguments and also for entertaining police report.

6. I have carefully perused the record. From the order-sheet it appears that the complainant was proceeding with the case diligently. He examined all the witnesses including the doctor and closed his case. He also appeared on the previous date in which the examination of the accused persons u/s 313, Cr.P.C, was made. The complainant filed a petition before the learned Magistrate that the accused persons were constantly threatening him and the learned Magistrate fixed 30-3-84 for report by police on the said allegation. On 30-3-84 the learned Magistrate acquitted the accused respondents on the ground that the complainant was absent on repeated calls and took no steps. He did not mention in the order, the actual time when he passed the impugned order of acquittal. It is submitted on behalf of the appellant that the appellant appeared before the Court a few minutes late with the Advocate but came to know that the case has been dismissed and the accused persons have been acquitted. I also find from the record that no report of the police was submitted on 30-3-84. The date 30-3-84 was fixed for hearing argument. When the complainant was prosecuting the case diligently by appearing on all dates of hearing, the learned Magistrate was not justified in observing that from the conduct of the complainant it is clear that the complainant was not eager to proceed with the case. The fact that the complainant filed a petition before the learned Magistrate making allegations against the accused respondents that they were constantly

threatening him and insisted on police report being submitted would also indicate that the complainant was not only diligent but also eager to see the criminal prosecution to be proceeded against the accused respondents successfully.

7. It is true that Section 256 provides that in a summons case if on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned and the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day. It is also provided in Section 256 that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. It has been observed in several decisions that even if the word "shall" is used in Section 256(1), the Magistrate has to exercise his discretion when the complainant is absent and he may come to the conclusion if there is a valid ground for adjournment. If he does not find any such valid ground he may dismiss the case and acquit the accused vide *Arumagham v. Valliammal* 1982 Cri LJ 1609. In [C.K. Sivaraman Achari Vs. D.K. Agarwall and Another](#), it has also been highlighted that on complainant's absence, three courses are open to the Magistrate, namely, (i) he may adjourn the case, (ii) he may acquit the accused or (iii) he may dispense with the attendance of the complainant and proceed and that it is his judicial discretion which course he would adopt. It has been laid down by our High Court in [Anar Bibi Vs. Habibur Rahaman and Others](#), that when the complainant was attending diligently every day but on the adjourned date he remained absent, the Magistrate was not justified in ordering an acquittal. The Orissa High Court in [State Vs. Jagatram Sahu and Another](#), has observed that there is no provision in summons case for the hearing of arguments, though arguments are heard after the evidence is over as a matter of convenience and the case cannot be dismissed or the accused acquitted under this section because of the absence of the complainant. In this particular case I also find that 20-3-83 was fixed not only for hearing arguments but also for the report from the police against the allegation made by the complainant against the accused respondents. No report was submitted. So when such a complaint was made it was necessary for the learned Magistrate to obtain report from the police and take necessary action because he has already entertained such an application from the complainant and directed the police enquiry. So even on that ground that acquittal of the accused on the date of hearing argument in the facts and circumstances of the case was not at all proper. The date fixed for arguments not being strictly a date fixed for hearing within the meaning of Section 256, Cri. P.C. it is doubtful if the Magistrate could exercise the discretion of acquitting the accused on that date. So I am convinced that the learned Magistrate did not exercise his discretion properly. He has arbitrarily exercised the discretion and observed that the complainant was not eager to proceed with the

case when records would clearly reveal that the complainant was really very eager to proceed with the case. In such circumstance the impugned order of acquittal is liable to be set aside.

8. I, therefore, direct the learned Magistrate to proceed with the case, from the stage at which it was dismissed and the order of acquittal was passed. The appeal be allowed. The order of acquittal be set aside and the case be sent back for retrial in the light of the observations made by me in this judgment.

9. Let the records be sent down before the learned Magistrate as expeditiously as possible.